Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1976

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No. 473

REBECCA REYHER,

Petitioner,

v.

CHILDREN'S TELEVISION WORKSHOP and TUESDAY PUBLICATIONS, INC.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
Questions Presented	1
Statement of the Case	2
Reasons for Denying the Writ	4
I.—The holdings below do not result in any conflict of decisions	4
II.—The Court of Appeals' review of the District Court's findings is contemplated by Rule 52(a) of the Federal Rules of Civil Procedure	9
Conclusion	15
SUPPLEMENTAL APPENDIX	
Trial Testimony of Petitioner Reyher:	
Transcript pages:	
71	1a
72	1a
116	2a
117	3a
118	3a
119	4a
120	5a
Trial Testimony of Jon Stone, author of Respondents' works:	
Transcript pages:	
153	6a
154	6a
155	7a
156	8a
157	8a
158	9a
159	10a
160	10a

Table of Cases

	PAGE
Ball v. Paramount Pictures, Inc. *et al.*, 169 F.2d 317 (3rd Cir. 1948)	8
Bevan v. Columbia Broadcasting System, Inc., 329 F.Supp. 601 (S.D.N.Y. 1971)	13
Brinker-Johnson Company v. Barnes, 272 F.2d 250 (9th Cir. 1959)	8
Burnett v. Lambino, 204 F.Supp. 327 (S.D.N.Y. 1962)	13
Concord Fabrics, Inc. v. Stafford Knitting Mills, Inc., 490 F.2d 1315 (2d Cir. 1969)	5
District of Columbia v. Pace, 320 U.S. 698 (1944)	6
Fritz v. Jarecki, 189 F.2d 445 (7th Cir. 1951)	8
Furrer v. Ferris, 145 U.S. 132 (1892)	6
Gadaleta v. Nederlandsch Amerekaansche Stoomvart, 291 F.2d 212 (2d Cir. 1961)	10
Giaraffa v. Moore-McCormick Lines, Inc., 270 F. Supp. 342 (S.D.N.Y. 1967)	10
Huie v. National Broadcasting Company, Inc., 184 F.Supp. 198 (S.D.N.Y. 1960)	10
Merril Trust Co. v. Bradford, 507 F.2d 467 (1st Cir. 1974)	8
Mid-Continent Casualty Company v. Everett, 340 F.2d 65 (10th Cir. 1965)	8
Millworth Converting Corporation v. Slifka, 276 F.2d 443 (2d Cir. 1960)	5
Nalle v. First National Bank of Baltimore, 412 F.2d 881 (4th Cir. 1969)	8
National Comics Publications v. Fawcett Publications, 191 F.2d 594 (2d. Cir. 1951)	13
Nichols v. Universal Pictures Corporation, 45 F.2d 119 (2d Cir. 1930) *cert. den.*, 282 U.S. 902 (1931)	12
Orvis v. Higgins, 180 F.2d 537 (2d Cir. 1950) *cert. den.*, 340 U.S. 810 (1950)	5, 6
Pacific Portland Cement Co. v. Food Machinery & Chemical Corporation, 178 F.2d 541 (9th Cir. 1949)	14

	PAGE
Pan American World Airways, Inc. v. Aetna Cas. & Sur. Co., 505 F.2d 989 (2d Cir. 1974)	7
Reyher and Gannett v. Children's Television Workshop, 387 F.Supp. 869 (1975); 533 F.2d 87 (2d Cir. 1976)	*Passim*
Securities and Exchange Commission v. Coffey, 493 F.2d 1304 (6th Cir. 1974); *cert. den.*, 420 U.S. 908 (1975)	8
Sheldon v. Metro-Goldwyn Pictures Corporation, 81 F.2d 49 (2d Cir. 1936) *cert. den.*, 298 U.S. 669 (1936)	12
Soles v. Franzblau, 352 F.2d 47 (3rd Cir. 1965) *cert. den.*, 383 U.S. 911 (1966)	8
Soptra Fabrics, Corp. v. Stafford Knitting Mills, Inc., 490 F.2d 1092, (2d Cir. 1974)	4, 5
Teamsters Local Union No. 688 v. Crown Cork & Seal Company, Inc., 488 F.2d 738 (8th Cir. 1973)	8
Thomas v. Commissioner of Internal Revenue, 254 F.2d 233 (5th Cir. 1958)	8
Tilghman v. Proctor, 125 U.S. 136 (1888)	6
United States v. Singer Manufacturing Co., 374 U.S. 174 (1963)	13, 14
United States v. United States Gypsum Co., 333 U.S. 364 (1948)	6, 14
Virginian R. Co. v. United States, 272 U.S. 658 (1926)	6
Volkswagen of America, Inc. v. Jahre, 472 F.2d 557 (5th Cir. 1973)	8
Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969)	5

Statute and Rule Citations

Rules 52(a) and (b), Federal Rules of Civil Procedure	*Passim*
Rules 59(b), (d), (e), Federal Rules of Civil Procedure	3

Authorities

	PAGE
5A Moore's Federal Practice, ¶ 52.04	8
1M. Nimmer on Copyright, § 39	10, 12
2 Street, Federal Equity Practice § 1510, 1514 (1909)	6
9 Wigmore on Evidence, 3rd Ed., § 2590, 2591 2593	10
Yankwich, "Originality in the Law of Intellectual Property", 11 FRD 457 (1951)	12

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RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Questions Presented

The Petition for Certiorari (p. 2) attempts to present two questions. The first claims without support of any kind that the Court of Appeals for the Second Circuit "disregarded and ignored the record and * * * reached a contrary decision." The second question raises a false issue by incorrectly stating the trial court's findings of fact.

The Court of Appeals affirmed the District Court's dismissal of petitioner's complaint on the same grounds that supported the District Court's legal conclusion; *i.e.*, "on the ground that any similarities between the two works related only to non-copyrightable matter." 533 F.2d page 90* and 387 F. Supp. 871.

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* The Opinions are reproduced in the Petition at pp. 1a-19a.

In reaching its conclusion, the Court of Appeals revised the trial court's legal analysis supporting the conclusion and overturned a non-controlling finding of fact based entirely upon a review of documentary evidence. Thus the sole question presented by the petition is whether the Court of Appeals exceeded its jurisdiction under Rule 52(a) of the Federal Rules of Civil Procedure.

Statement of the Case

The petitioner's complaint charges copyright infringement in that the respondents' works* are claimed to be copied from the petitioner's children's book entitled "My Mother is the Most Beautiful Woman in the World", a folktale retold by Becky Reyher. After extensive oral and written discovery, respondents moved for summary judgment before trial, contending that since the similarities between the competing works arose only from the use of the same folktale admittedly used by petitioner, she was precluded as a matter of law from recovery in an action predicated upon a claim of copyright infringement. By memorandum decision, dated January 28, 1974, Judge John M. Cannella denied the respondents' motion for summary judgment, holding that by reason of the similarity of story line there existed a question of fact precluding summary judgment. Thereafter, the District Court sitting without a jury conducted a full trial on the merits on April 23 and 24, 1974.

Both the petitioner and the respondents submitted trial memoranda and after trial submitted proposed Findings of Fact, Conclusions of Law and post-trial memoranda.

* Respondents' works are fully itemized and described by the District Court in the opinion of the Hon. John M. Cannella reported at 387 F. Supp. 869 and reproduced in the petition at pp. 12a-19a.

On the evidence, Judge Cannella concluded that petitioner's work consisted *entirely* of translating a Russian language folktale and that therefore the work must be regarded as "derivative". The Court also found that since there was no textual duplication of any of petitioner's intellectual product (her translation) and since the similarities in story line were the product of a common public domain source, petitioner could not succeed under the copyright statutes. For these reasons, Judge Cannella dismissed the petitioner's complaint.

Thereafter, petitioner moved the District Court, pursuant to FRCP Rules 52(b) and 59(b), (d) and (e) to reconsider, to amend its Findings of Fact and Law and to make additional Findings, to amend its judgment dismissing the complaint and in the alternative to grant petitioner a new trial. By order dated April 1, 175 Judge Cannella granted the motion to reconsider, reconsidered and denied the petitioner's remaining motions.

Petitioner then appealed to the Court of Appeals for the Second Circuit and both petitioner and respondents submitted briefs addressing the questions (1) whether the District Court erred in characterizing petitioner's children's book as "derivative" if the book consisted of an English translation of a Russian language folktale which the author admitted to having heard from her mother during her childhood, and (2) whether the District Court properly dismissed the complaint claiming copyright infringement, if there was no proof of access and if the similarities between respondents' and petitioner's work derive solely from the idea embodied in a public domain folktale upon which each author admittedly relied.

Writing for the Court of Appeals, Judge Meskill expressed "grave doubts" about the District Court's characterization of petitioner's book as a derivative work,

explaining his reasons therefor, modified the analysis and overturned the finding of substantial similarity upon its independent review of the works in issue. Nonetheless, the Court of Appeals affirmed the District Court's dismissal of petitioner's complaint on the same ground that supported the District Court's legal conclusion; *i.e.*, "that any similarities between the two works related only to non-copyrightable matter." 533 F.2d at page 90 and 387 F.Supp. at page 871.

REASONS FOR DENYING THE WRIT

I.

The holdings below do not result in any conflict of decisions.

The petitioner urges this Court to issue a Writ of Certiorari, arguing that "in a line of cases lead by *Soptra Fabrics, Corp.* v. *Stafford Knitting Mills, Inc.*, 490 F.2d 1092, 1093 (2d Cir. 1974)", the Court of Appeals for the Second Circuit has considered a finding of "clearly erroneous" inapplicable to deliberations concerning the reversal of the lower court findings under Rule 52(a) of the Federal Rules of Civil Procedure. She argues further that the Second Circuit "disregards that standard in reversing a finding of fact by a District Court whenever it believes it is reviewing documentary evidence and not the credibility of witnesses."

Specifically, petitioner refers to the language appearing at 533 F.2d page 90, where the Court of Appeals stated in the present proceedings that:

> "While we recognize that our appellate function usually does not include fact finding, where, as here, the determination of similarity rests solely on a comparison of the works in issue rather than on credibility of witnesses or other evidence only for the fact finder, 'we are in as good a position as the trial judge' to determine the issue. *Soptra Fabrics Corp.* v. *Stafford Knitting Mills, Inc.*, 490 F.2d 1092, 1093 (2 Cir. 1974); *Concord Fabrics, Inc.* v. *Marcus Brothers Textile Corp.*, 409 F.2d 1315, 1317 (2d Cir. 1969) (per curiam); *Millworth Converting Corporation* v. *Slifka*, 276 F.2d 443, 445-446 (2 Cir. 1960); *cf. Orvis* v. *Higgins*, 180 F.2d 537, 539 (2 Cir.) *cert. denied*, 340 U.S. 810, 71, S.Ct. 37, 95 L.Ed. 595 (1950). See 1 Nimmer § 140 at 607."

Respondents respectfully submit that the Court of Appeals for the Second Circuit's view of the scope of appellate review under Rule 52(a) as reflected above is consistent with the principles articulated by this Court and with those articulated by the various other circuits. On the basis of the quoted language, however, petitioner claims not only that the Second Circuit has violated the principles enunciated by this Court in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969) but also that its decision reflects a split of authority in the Circuits which requires resolution by this Court. Respondents do not agree with either of these contentions.

The language of this Court cited by petitioner in support of her argument is found in *Zenith, supra,* at page 123. The quoted language constitutes a reminder to the reviewing courts that there are limits to the scope of appellate review and states two requirements. The first is that the authority of the appellate court is circumscribed by the deference it must give to the decisions of the trier of fact "who is usually in a superior position to appraise and weigh evidence." *Id.* at 123. The second is that upon re-

view of the lower court's findings, the question for the appellate court is "whether 'on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed.'" *Id.* at 123. This quoted language in *Zenith* was first stated in *United States* v. *United States Gypsum Co.,* 333 U.S. 364, 395 (1948) where this Court said that Rule 52(a) prescribes that findings of fact in actions tried without a jury "shall not be set aside unless clearly erroneous" and stated further that the rule applies to inferences drawn from documents or undisputed facts. *Id.* at 394. The Court also observed however that the rule was intended to reflect the equity practice of giving great weight to the findings of the trial court when dependent upon assessment of the candor and credibility of witnesses.*

In that case moreover, this Court rejected the finding of the trial judge that defendants in an antitrust action had not acted in concert, remarking that "the witnesses denied that they . . . had agreed to do things which in fact were done. Where such testimony is in conflict with contemporaneous documents we can give it little weight, . . ." *Id.* at 396.

It was in view of the foregoing language in *United States Gypsum* that Judge Frank, writing for the Court of Appeals in *Orvis* v. *Higgins,* 180 F.2d 537, 539 (2d Cir. 1950) *cert. den.* 340 U.S. 810 (1950) held that "where a trial judge sits without a jury, the rule varies with the character of the evidence . . . we may ignore the trial judge's finding and substitute our own . . . if the trial judge's finding must rest exclusively on the written evidence or the

* There, at page 395, the Court cited 2 Street, Federal Equity Practice (1909) §§ 1510, 1514; *Furrer* v. *Ferris,* 145 U.S. 132; *Tilghman* v. *Proctor,* 125 U.S. 136, 149-50; *District of Columbia* v. *Pace,* 320 U.S. 698, 701; *Virginian R. Co.* v. *United States,* 272 U.S. 658, 675.

undisputed facts, so that his evaluation of credibility has no significance . . . but where the evidence supporting his finding as to any fact issue is entirely oral testimony, we may disturb that finding only in the most unusual circumstances."

In reaching that conclusion, Judge Frank observed early in his opinion that:

> ". . . holding that the findings of trial judges were not 'clearly erroneous' within the meaning of Rule 52(a) . . . we have often stressed the importance of a trial judge's advantage over us when he saw and heard the witnesses as they testified. We have pointed out our inability to appraise the cogency of demeanor evidence, lost to us because it cannot be captured in the witness' words as recorded on paper." (citations omitted)

Thus the Court of Appeals view in *Orvis* reflects both the caution of the "clearly erroneous" rule applied on appellate review and it recognizes the practical realities which permit the reviewing court to conduct an independent examination of findings which rest entirely upon documentary evidence.

It is the *Orvis* view which underlies the statement below that:

> ". . . [W]here, as here, the determination of similarity rests solely on a comparison of the works in issue rather than on credibility of witnesses or other evidence only for the fact finder, 'we are in as good a position as the trial judge' to determine the issue." 533 F.2d 90.

In *Pan American World Airways, Inc.* v. *Aetna Cas. & Sur. Co.,* 505 F.2d 989 (2d Cir. 1974), moreover, the Court

of Appeals rejected the same broad interpretation of the cases led by *Orvis* and *Soptra* as urged by the present petitioner, stating at page 1004 that

> "*Orvis* stands for the proposition that a record consisting only of pleadings, depositions, and affidavits may, at the reviewing court's discretion, be reviewed de novo. It does not control a case like the present one, in which a great deal of the evidence consisted of third party testimony as to the statements and intentions of others."

Thus given the limits to the principle stated in *Orvis,* in *Soptra* and in the present proceedings in the court below, respondents submit that the Court of Appeals' application of this Court's directive on the scope of review under Rule 52(a) is faithful to the purpose and scope of that provision and that it is consistent with the views expressed in other circuits.*

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* See *e.g., Soles* v. *Franzblau,* 352 F.2d 47 (3rd Cir. 1965), *cert. den.* 383 U.S. 911 (1966); *Ball* v. *Paramount Pictures, Inc.,* 169 F.2d 317 (3rd Cir. 1948); *Volkswagen of America, Inc.* v. *Jahre,* 472 F.2d 557 (5th Cir. 1973); *Thomas* v. *Commissioner of Internal Revenue,* 254 F.2d 233, 236 (5th Cir. 1958); *Securities and Exchange Commission* v. *Coffey,* 493 F.2d 1304 (6th Cir. 1974), *cert. den.* 420 U.S. 908 (1975); *Fritz* v. *Jarecki,* 189 F.2d 445 (7th Cir. 1951); *Teamsters, Local Union No. 688* v. *Crown Cork & Seal Company, Inc.,* 488 F.2d 738 (8th Cir. 1973); *Brinker-Johnson Company* v. *Barnes,* 272 F.2d 250 (9th Cir. 1959); *Mid-Continent Casualty Company* v. *Everett,* 340 F.2d 65 (10th Cir. 1965): See also, Vol. 5A, Moore's Federal Practice, ¶ 52.04; but see *Merril Trust Co.* v. *Bradford,* 507 F.2d 467 (1st Cir. 1974); *Nalle* v. *First National Bank of Baltimore,* 412 F.2d 881 (4th Cir. 1969).

II.

The Court of Appeals' review of the District Court's findings is contemplated by Rule 52(a) of the Federal Rules of Civil Procedure.

The petitioner argues further that the Court of Appeals for the Second Circuit affirmed the decision of the District Court dismissing petitioner's complaint upon "completely different grounds" and that in so doing it abused the principles of Rule 52(a) of the Federal Rules of Civil Procedure. This contention, however, is based upon both incorrect reading of the Court of Appeals opinion and a misinterpretation of Rule 52(a), *supra.*

The Court of Appeals sustained the District Court's legal conclusion on the same finding of fact which supported the District Court's dismissal of the complaint after a full trial on the merits; *i.e.,* "on the ground that any similarities between the two works related only to non-copyrightable matter". See 533 F.2d at Page 90 and 387 F.Supp. at page 781. It is only in the application of the "derivative work" principles that the courts differ in their analysis, but this difference in legal analysis neither violates the principles of Rule 52(a) nor changes the outcome.

In the District Court, Judge Cannella examined all of the testimony and evidence offered at trial and summarized the salient features in his opinion, pointing out at 387 F.Supp. 870 that:

> "In the instant case, we have a book which the author candidly admits is based upon a story which was told to her by her Russian mother. It is the belief of plaintiff Reyher (although no direct evidence was adduced to this effect) that the story told to her by her mother is in fact a Russian folk tale.

> It is clear from plaintiff's testimony that the story line as it appears in her copyrighted book is substantially taken from, if not identical with, the story told to her by her mother . . ."

In addition, the record shows that petitioner acquiesced in the notations appearing in her copyright registration, certificate of copyright and book fly-leaf, reading "A Russian Folk tale retold by Becky Reyher"* (pp. 1a, 4a-5a, *infra*). As pointed out by the District Court at 387 F.Supp. 870, petitioner:

> "did not testify that she had added anything to the story or changed it in any significant way. In fact, [petitioner] indicated that she wrote the book using a Russian dictionary. This clearly suggests a process whereby [petitioner] attempted to recall the story as told to her by her mother in Russian and then to translate that reco'lection into English."

Given these facts, Judge Cannella concluded that petitioner's book was a derivative work. "That is, it has been 'substantially copied from a prior work' in the public domain. (1 M. Nimmer on Copyright § 39 at 166)." Id. at 870.

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* In Point III of her argument, petitioner now urges that "there was no evidence adduced of any other such story as she told . . ." In view of the record, however, it is difficult to fathom the basis upon which petitioner makes this assertion. Having asserted upon registering for copyright and having consistently maintained throughout these proceedings—in answers to interrogatories, in sworn testimony before trial and again at trial—that her work is based upon a Russian folk tale, petitioner is now estopped from claiming that there is no public domain source for her work. *Huie* v. *National Broadcasting Company, Inc.*, 184 F. Supp. 198 (S.D.N.Y. 1960); and for the operation of judicial admissions, see *Gadaleta* v. *Nederlandsch Amerekaansche Stoomvart*, 291 F.2d 212, 213 (2d Cir. 1961); *Giarafla* v. *Moore-McCormick Lines, Inc.*, 270 F. Supp. 342 (S.D.N.Y. 1967); 9 Wigmore on Evidence, 3rd Ed. §§ 2590, 2591 and 2593.

Upon comparison of petitioner's work and respondents' works, Judge Cannella also concluded that in his view there was substantial similarity between the works in issue but held that the similarities rested in the use of a common idea and sequence of events both of which were necessary elements of the folktale and thus entirely within the public domain. Accordingly, he concluded that "defendants' use of a story line which is substantially similar to that appearing in plaintiff's copyrighted book does not give rise to a cause of action under the copyright laws." 387 F.Supp. at 871.*

The Court of Appeals for the Second Circuit agreed with Judge Cannella's conclusion and affirmed the dismissal of petitioner's complaint "on the ground that any similarities between the two works related only to non-copyrightable matter." 533 F.2d at 90. Given petitioner's fact

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* Petitioner claims that the District Court found both substantial similarity and "access" as elements supporting her claim of copyright infringement. On the "access" point, petitioner refers to an excerpt from Judge Cannella's opinion and argues on the basis of the excerpt that the District Court found respondents had access to petitioner's work. The excerpt reads: "The most that *could be said* is that they have read the plaintiff's work and have retold the story in their own words." In the context of the opinion, it is clear that this statement was made to make the point that *even if* defendants had seen the plaintiff's work there would be no evidence sufficient to support the finding of copyright infringement. It merely assumes access for the purpose of the argument, but in view of the evidence was clearly not intended to suggest the respondents did in fact have access to petitioner's work. In her answers to interrogatories before trial, petitioner admitted that she had no evidence of access and at trial she presented no evidence of access, relying entirely upon the circulation of her book. In addition, Jon Stone, the man who authored the respondents' works, testified that he heard the same folktale from either his mother or a babysitter telling the story to his younger sister around 1950 (p. 9a, *infra*). Working for Children's Television Workshop, he retold that story from his own memory as a part of the Sesame Street Children's Educational Program (p. 9a, *infra*). Naturally the story he told had the same sequence of events as that appearing in petitioner's work and it is this which gives rise to the non-actionable similarities found by Judge Cannella.

testimony, however, the Court of Appeals expressed "grave doubt" and disagreed with Judge Cannella's legal characterization of petitioner's book as a "derivative work" pointing out that the petitioner

> "could neither recall the exact story her mother told nor the precise language used. More importantly, no tangible or intangible prior work was proved with sufficient detail to enable a court to judge either whether substantial copying of anything other than the idea of the prior work had occurred or which part of her adaptation constituted her own new, and thus protected, material. In light of the absence of such evidence, to characterize Reyher's work as derivative merely because she used memories of her mother's story would create problems in protecting any literary endeavor as well as exacerbate the difficulty in determining the protection to be afforded a particular effort."

In its extensive discussion of the difficulties in distilling the nonprotected idea from the protected expression in copyright infringement actions (533 F.2d 90-91), the Court of Appeals overturned the District Court's finding of substantial similarity, affirming the principle that "[S]imilarity of expression . . . which necessarily results from the fact that the common idea is only capable of expression in more or less stereotyped form will preclude a finding of actionable similarity," citing 1 Nimmer § 143.11 at 626.2 and Yankwich "Originality in the Law of Intellectual Property" 11 FRD 457, 462 (1951).*

* In connection with its discussion of the delineation between nonprotected idea and protected expression, the court relied upon the principles enunciated in *Nichols* v. *Universal Pictures Corporation,* 45 F.2d 119, 121 (2 Cir. 1930), *cert. den.* 282 U.S. 902, 51 S.Ct. 216, 75 L.Ed. 795 (1931); *Sheldon* v. *Metro-Goldwyn Pictures Corporation,* 81 F.2d 49, 54 (2d Cir. 1936), *cert. den.* 298 U.S. 669 (1936); *Burnett* v. *Lambino,* 204 F. Supp. 327 (S.D.N.Y. 1962); *Bevan* v. *Columbia Broadcasting System, Inc.,* 329 F. Supp. 601 at 605 (S.D.N.Y. 1971); *National Comics Publications* v. *Fawcett Publications,* 191 F.2d 594, 600 (2d Cir. 1951). The petitioner urges that the Court of Appeals failed to examine the Sesame Street Video Tape Muppet Presentation, arguing implicitly that if it had done so it would have observed "substantial similarity" between the disputed works. The contention, however, is of no moment since the fact is that by virtue of the use of the folktale, the story line in each of respondents' works is the same. Furthermore, the District Court, sitting without a jury, did view the muppet video tape (exhibits 12, 13) and concluded that petitioner's complaint must be dismissed despite its findings of substantial similarity, holding that the "defendants have not infringed upon any substantial portion of plaintiff's copyrighted book in which plaintiff can claim any proprietory interest covered by copyright laws." 387 F.Supp. at 781. Thus, the Court of Appeals omission of specific reference to the muppet video tape in its opinion can hardly support the petitioner's contention that a review of its content would offer further evidence in support of petitioner's claim.

Both the District Court and the Court of Appeals for the Second Circuit agreed on the central issue:

> "there being no claim by Mrs. Reyher that her mother's story is copyrighted or that it is entitled to any form of protection, the defendants have the same right to make use of it as does Mrs. Reyher, herself. Thus, defendants' use of a story line which is substantially similar to that appearing in the plaintiff's copyrighted book does not give rise to a cause of action under the copyright laws." 387 F.Supp. at 871.

Respondents submit that the Court of Appeals' review in the proceedings below amounts to the type of review contemplated by FRCP Rule 52(a) and by this Court in *United States Gypsum Co., supra.* Whether the trial court's findings be characterized as findings of law or findings of fact based upon documentary evidence, it is subject to modification by the reviewing court "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." 333 U.S. at 395.

That view has been affirmed by this Court. In footnote nine at pages 194 and 195 of this Court's opinion in *United*

States v. *Singer Manufacturing Co.*, 374 U.S. 174 (1963), Mr. Justice Clark found the trial court's conclusion "clearly erroneous" where it found the parties' concerted activities were not motivated by a common purpose on the questions of "mutual interest" in the achievement of an agreement to assign a patent, stating that:

> "Insofar as that conclusion derived from the court's application of an improper standard to the facts, it may be corrected as a matter of law. Insofar as the conclusion is based on 'inferences drawn from documents or undisputed facts, . . . Rule 52(a) of the Rules of Civil Procedure is applicable.' *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 394 (1948) . . . The evidence here, including many findings of the trial court, clearly compels the conclusion that the parties' concerted activities were motivated by a common purpose, and the court's conclusion to the contrary must be regarded as clearly erroneous. *United States* v. *United States Gypsum Co., supra;* see *Pacific Portland Cement Co.* v. *Food Mach. & Chem. Corp.*, 178 F.2d 541 (C.A. 9th Cir. 1949)".

Petitioner can hardly claim that the review conducted by the Second Circuit in these proceedings exceeded the boundaries of Rule 52(a). Insofar as the District Court's conclusion derived from the application of an improper standard to the facts, "it can be corrected as a matter of law." Insofar as it derived from a review of documentary evidence, it can be given "little weight". Thus, on the cited authority, respondents submit that the Court of Appeals properly reviewed the findings of the District Court.

CONCLUSION

The Court should deny the Writ of Certiorari.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

(71) heard it or from whom, if at all? A. Of my own knowledge?

Q. That's correct, of your own knowledge. A. No.

Q. You do not know? A. No.

Q. So you do not know of your own knowledge that this was a folktale told from mother to child, or anyone else, in any other way in the Ukraine, or anywhere else? A. I only know it was one of the stories my mother told me and she told me a great many.

Q. All right. In what language did your mother tell you that story? A. She told it to me in Russian. And I would like to interpose that I only spoke Russian until I was five, except for a very few words that I spoke to my Negro nurse.

Q. When you wrote your book, you wrote it, I take it, in the English language? A. Yes.

Q. Did that require a translation of what you had heard from your mother? A. It not only required a translation, it required two volumes of a Russian dictionary to check certain words and impressions that I had because this was an impression rather (72) than a literal translation. Anything that I used that she had told me might have been a translation, but it also was primarily a mood and mine was an interpretation.

Q. Well, would you say that your copyrighted book in suit is a literal translation of what you heard from your mother? A. Not at all.

Q. And in what way does it differ from what your mother told you? A. Could I just say something here and interpose something about the title and what my mother told me?

Q. All right, as an illustration let us refer to the title. A. The title of the book which the judge has and which you have as an exhibit is "My Mother is the Most Beautiful Woman in the World."

Q. That is the title you gave the book? A. That's the title I gave. This was the theme. This was not the title of the Russian story my mother told me from which I retold and adapted my story.

The title and the theme of the book as my mother told it to me translated into English would be "My mama is the most beautiful in the whole world."

In Russian but written phonetically in
(116) That is what he wants to know.

The Witness: Well, I don't know who was the authority for the explicit copyright information.

Q. Did you ever object to that characterization? A. I never objected to it.

Q. I show you Plaintiff's Exhibit 3 in evidence, which is a copy of your book, and I direct your attention to the inside flyleaf which says, "A Russian Folktale Retold by Becky Reyher." Who is responsible for that language being included on the inside flyleaf? A. I would answer in the same way.

Q. What same way? A. As I did before.

Q. That you didn't do it and you didn't authorize it? A. That I—I would like to ask whether I may ask a question when you ask me something.

The Court: No.

The Witness: Not for clarification?

The Court: It is not allowed. You talk to your lawyer when you get through and then if anything has to be clarified your lawyer will put you back on the stand and then he'll ask you questions to clarify it. But right now, as I just reminded the lawyer, each lawyer is entitled to ask the questions in

the form in which he wants, in the (117) direction which he wants and in the area which he wants and unless they are objectionable for some legal reason I will rule upon it. It is your obligation as a witness to answer to the best of your ability.

There are a number of answers which are possible. Amongst them are three little words, "I don't know."

What is the last unanswered question, if there is one?

(Record read)

A. I don't know.

Q. Did you authorize your publisher to include that language? A. I don't recall discussing it with my publisher.

Q. Did you over object to your publisher about the inclusion of that language? A. No.

Q. I direct your attention to the—

The Court: Is it your present position that this is not a Russian folk story?

The Witness: No, it is not my position. My position is that I told it in my own way. I retold it.

The Court: I realize that, but I am asking you now categorically in your opinion is this a Russian folk story which you rewrote?

(118) The Witness: Yes.

The Court: All right, so it is a Russian folk story? That's the genesis of it?

The Witness: Yes.

The Court: That's all he is trying to establish.

The Witness: I was confused.

Q. I ask you the same question with respect to the title, "A Russian Folktale as Retold by Becky Reyher." A. Probably the publisher, but I didn't object.

Q. Did you ever authorize the publisher to use that language? A. It was not under discussion.

Q. Where would he have gotten that if not from you?

The Court: It's very hard to be big like you and I are and tower over a poor little lady sitting in the witness chair trying to collect her thoughts so go back and let her answer you from the counsel table. This is a small room, we can all hear one another.

Didn't you like the design of this book? That looks like a nice front page there. Didn't you look at it after it came out?

The Witness: After it came out and while it was being made.

The Court: You saw that on there and raised no (119) question about it?

The Witness: No.

Q. I direct your attention to the dedication page, the page in front of the title page. Can you read it out loud, please? A. "For my Russian mother Lisa Hourwich who told this story to me when I was a child, and whose stories still seem to me the most beautiful in the world."

Q. Did you write that dedication? A. I wrote that dedication.

Q. Now, without going into Russian translations, can you please tell me the story, to the best of your recollection, that your mother told you when you were a child? A. I couldn't possibly tell you the story that my mother told me when I was a child. I am a great grandmother and my

mother told me hundreds of stories. I couldn't remember the story that my mother told. I told Mr. Eldridge—may I just—that there was a storyline and that appeared in your testimony.

Q. What was the storyline that you recall that your mother told you? A. The storyline is very simple. It's the story of a child who is lost, is bewildered, terrified and finally finds people who are willing to held her and tells them about (120) her mother who she thinks is beautiful and they go searching for a beautiful woman and they find the child and reunite them. That is the skeleton of the story.

I would like to say at this point—and I don't know if the judge will overrule me—that there is a famous basis for literature, boy meets girl.

Mr. Girden: Your Honor—

The Witness: And I have taken a storyline, but I have adapted it and that's the synonym for retold and that's why I raise no objection to retold. It's my treatment. That's what this book is, even though it was my mother's story.

Q. All right, now, Mrs. Reyher, you testified that innumerable times your story has been read over the radio, sometimes with your permission and sometimes without, is that correct? A. I would not know, but I know if it was without my permission, and I would know if it had been with my permission over the years.

Q. And you stated that hundreds of times the book has been used as the basis for story telling in libraries, is that correct? A. Yes, there is a special library edition of this book and innumerable testimonials from librarians as to the

(153) A. I am the executive producer and head writer of Sesame Street.

Q. For what period of time have you been associated with Sesame Street as executive producer and head writer? A. As executive producer for the last two years. I was the original head writer and then there was a period of several years in between when there was another gentleman performing that function.

Q. When did Sesame Street start? A. It went on the air in November of 1969.

Q. Prior to your association with Children's Television Workshop, did you have any experience in the television field, particularly with respect to children's programming? A. I was immediately prior to Sesame Street, a free-lance producer producing specials, developing projects for networks.

Prior to that, I was the producer of Captain Kangaroo and wrote that program.

Q. On CBS? A. Yes, and I wrote that program, too, for six years.

Q. In what period of time did you first enter the television field? A. January of 1956.

Q. Have you been continuously in the television field (154) with a stress of children's programming continuously since that time? A. Yes.

Q. Can you please tell the Court what Sesame Street is? A. It's an experimental educational television program which is intended to prepare preschool children for the school experience.

Q. By "preschool," you mean five and under? A. Three, four, and five would be the target audience.

Q. In the period of time from the inception of the program in 1969, say, through the end of 1970, what was your

particular function with respect to the program? A. I was one of several producers and my primary duties were as head writer.

Q. How many times a week was the program produced? A. On the air?

Q. Yes. A. It's on the air daily for at least an hour and in most markets it's on the air several hours a day.

Q. Is Children's Television Workshop a nonprofit organization? A. Yes.

Q. Does it exist by outside grants? (155) A. Primarily, yes.

Q. And are the programs over public television? A. They are.

Q. Are the programs sponsored? A. No.

Q. In the period November of 1970, approximately how many programs per week were you writing and producing? A. I was writing two scripts a week and editing the other scripts.

Q. How did you go about picking subject matter for any particular program? Let's concentrate on the program of November 18, 1970. Do you recall how you picked the subject matter for that program? A. The show was written according to a very strictly structured curriculum. Sesame Street has a number of educational goals and they are divided by a curriculum coordinator over the 130 programs that we would produce in any given season. For the particular day you have mentioned, there would have been —there was—a curriculum page which told me as the writer what areas I was to cover in terms of curriculum on that given day.

Mr. Girden: I would like marked as Defendants' Exhibit A for identification a curriculum sheet for show number 138.

(Defendants' Exhibit A marked for identification.)

(156) Q. I show you Defendants' Exhibit A for identification and ask if you can identify it? A. Yes.

Q. How do you identify it? A. That would be the curriculum sheet for show number 138.

Q. Was the show broadcast on November 18, 1970? A. I believe so.

Mr. S. Stoll: Is there any reference here to the Sesame Street presentation of "The Most Beautiful Woman in the World"?

Mr. Girden: We will get to that, Mr. Stoll.

Mr. S. Stoll: Subject to tying it in, I won't object to it if they can tie it in.

The Court: All right, received with that condition.

(Defendants' Exhibit A for identification received in evidence.)

Q. I show you Defendants' Exhibit A in evidence and ask you who prepares these curriculum sheets. A. This one was prepared, I believe, by Joan Lufrano, L-U-F-R-A-N-O.

Q. When you receive that curriculum sheet, how do you then go about structuring the program of the day in question? A. It would be my responsibility as a writer to (157) incorporate as many of these curriculum items as I possibly could into the show for that particular day.

Q. Was there a particular curriculum item on that particular day which eventually led to the writing of "The Most Beautiful Woman in the World"? A. There is, under the general heading of "Cognitive Organization," subheading "Perceptual Discrimination," there was the assignment "Objective-Subjective Discrimination."

At that time we had two separate curriculum goals. One was "Subjective-Objective Discrimination." The other was "Differing Perspectives." They have since been lumped together under the general heading because we found they were so similar they weren't really treated as separate items.

The point of view to be gotten across, which is a very important early education object, is what may look one way to one person oftentimes looks different to another person.

Q. Did you make the determination how you would depict that orally and visually to your Sesame Street audience? A. I did.

Q. How did you make this determination? A. Well, I remembered this story in years past and thought it was an excellent example of just that, this (158) differing perspective.

Q. From what period of time in your life do you recall this story? A. It was a story that was told to my sister when she was a very young child, and my sister was fifteen years younger than I am, so she was a child. This would have been around 1950 when she was about five years old.

Q. Approximately 22 to 24 years ago? A. Yes, approximately.

Q. Do you recall hearing this story told to your sister? A. Well, I recall the story told at that time. I don't recall specifically who told it to her. It was a favorite of hers. It was almost certainly either my mother or a woman called Mrs. Looney, who was a daily babysitter and helper in our household.

Q. What did you recall in your memory of the story as you heard it? Approximately 24 years ago. A. I remembered the shape of the story as a sort of folktale, fairy tale idea.

Q. Can you please recite for the record what it is you remembered of the story as you heard it in around 1950? A. Well, the story, as best I can recall it some 20 odd years later, would be, "Once upon a time, many years ago," (159) and I remember it being characterized as being in Russia.

Some people were out working one day and they heard a child crying. So they found out who it was and they discovered a little boy and the little boy was crying so hard he couldn't talk very well. So they said to him, "Who is your mother?"

And then the boy stopped crying for a minute and he said, "Oh, my mother is the most beautiful woman in the world."

They said, "That's easy enough, just find the most beautiful woman and bring her around and that would be the boy's mother."

So they did. They brought the most beautiful woman around and the boy said to her, "No, that's not my mother, my mother is the most beautiful woman in the world."

They said, "Who is the most beautiful woman in our village? Maybe we better go farther afield."

They went farther away and kept bringing back beautiful women and showed them to the little boy. And the little boy said, "No, that's not my mother. She's the most beautiful woman in the world."

By that time someone came to the crowd gathered by this time, and it was somebody whose hands were worn from working in the field and quite old and gray-haired and eyes (160) red from crying. And the little boy immediately identified her as his mother and said, "Mother."

And they were terribly surprised and said, "But this surely can't be your mother. You told us your mother was the most beautiful woman in the world."

The boy said, "She is, look at her."

The point being that what is beautiful for one person may not be to another.

Q. Did you tell that story as the example of the differing perspective facets of your program? A. Yes.

Q. What did you do next? A. The next step I would normally take is decide what form the story should take, that is, should our live actors act it out on a set or in another set, or would it best be deferred and be made into a film or an animation. And I decided to do it with puppets. I used a form I do frequently on the show and that is a narrator.

Q. Did you write the scripts for the segment we are talking about? A. I did.

Q. How do you go about writing the scripts? A. I take a legal-size yellow pad and make notes to myself in pencil and from those notes I type the script.